Khoo Ah Imm @ Chang Bee Kiam & Ors v Datuk Bandar Kuala Lumpur & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-236-97
GOPAL SRI RAM, AHMAD FAIRUZ AND DENIS ONG JJCA
28 MAY 1997

Administrative Law *— Remedies — Certiorari — Alternative remedy in private law — Application to quash order by Datuk Bandar in rescinding stop work order on development project — Whether applicants have substantive locus standi to receive remedy of certiorari — Whether certiorari would issue where there is better or at least equally efficacious relief in other proceedings or at an alternative forum — Whether alternative remedy in private law was sufficient protection of applicants' rights — Whether justice of the case lie in refusing the remedy*

The appellants were the owners and occupiers of several apartments in a condominium ('the condominium'). The land below the appellants' condominium ('the land') belonged to the Mayor of Kuala Lumpur ('the first respondent'). By a joint venture agreement, the first respondent and the second respondent agreed to develop the land. Planning approval for the project was given by the first respondent. The appellants were dissatisfied with the decision and filed an originating motion seeking to quash the decision. A compromise was reached and a settlement agreement was drawn up between the appellants and the second respondent ('the settlement agreement') where the second respondent had guaranteed the structural safety of the condominium and/or the safety of its residents and their property. A consent order was then entered into between the parties providing, inter alia, for liberty to apply in general terms for directions and orders in respect of matters pertaining to the settlement agreement.

The second respondent then took possession of the land and commenced earthworks, causing cracks and subsidence resulting in a difference in the floor levels of the condominium. The appellants wrote to the solicitors of the first respondent and the first respondent, exercising his powers under s 70A(4) of the Street Drainage and Building Act 1974 ('the Act'), issued a stop work order ('the stop work order').

Later, further meetings took place between the parties, the outcome of which, according to the appellants, was that they would be consulted on the issue of their safety from time to time by the first respondent before he exercised any of his powers under s 70A of the Act. This did not happen as subsequently, the first respondent made an order rescinding in toto the stop work order.

The appellants challenged the order made by the first respondent in rescinding the stop work order. The judge dismissed the appellants' application for certiorari, principally on the ground that the appellants had no locus standi to receive the remedy of certiorari. The appellants

A appealed. Counsel for the appellants submitted that his clients had substantive locus standi because they were victims of procedural unfairness. Counsel for the respondents submitted, inter alia, that: (i) the doctrine of procedural fairness or legitimate expectation to receive such fairness should be withheld if the consequence of injecting either doctrine was to produce a burdensome or unjust result; and B (ii) there was sufficient protection within the sphere of private law for the appellants, and therefore, the remedy of certiorari ought not to be granted.

Held, dismissing the appeal:

C (1) It is well settled that certiorari is one of those remedies in public law which cannot be claimed ex debito justitiae, but is a discretionary remedy. An applicant who makes out a case may yet be denied the remedy on a number of grounds, depending on the facts and circumstances of each case. One of the grounds on D which the remedy of certiorari may be withheld is where the supplicant is able to obtain better or at least equally efficacious relief either in other proceedings or at an alternative forum. In the present case, by the settlement agreement, the second respondent had guaranteed the safety of the appellants in no uncertain terms. When they filed the first application which was E compromised, it was open to the appellants to have pursued this remedy to conclusion but they chose not to do so. In addition, they reserved unto themselves, under the terms of the consent order, the right to approach the court in the working out of the settlement agreement. This was a sufficient protection of their rights (see p 604H–I and 605D–G).

F (2) While the powers of the court in public law remedy cases are very wide, great caution must be taken in exercising them. Justice of the present case lies in refusing the remedy rather than in granting it. The appellants were not without any remedy. Their private law remedy in this case was far more efficacious and would G produce the result which they desire.

Thus, the learned judge was correct in dismissing the application for certiorari on the ground that substantive locus standi was wanting. Further, the practicalities of the present case did not warrant the application of the doctrines of procedural H fairness or legitimate expectation. The application of these doctrines would produce injustice (see pp 606B and 607C–D).

[Bahasa Malaysia summary

Perayu-perayu adalah pemunya dan penghuni beberapa apartmen di I sebuah kondominium ('kondominium tersebut'). Tanah di bawah kondominium perayu-perayu ('tanah tersebut') adalah kepunyaan Datuk Bandar Kuala Lumpur ('penentang pertama'). Melalui suatu perjanjian usahasama, penentang pertama dan penentang kedua bersetuju memajukan tanah tersebut. Kelulusan perancangan untuk

projek itu diberikan oleh penentang pertama. Perayu-perayu tidak berpuas hati dengan keputusan itu dan memfailkan satu usul pemula yang meminta supaya keputusan dibatalkan. Suatu kompromi dicapai dan suatu perjanjian penyelesaian dibuat antara perayu-perayu dan penentang kedua ('perjanjian penyelesaian tersebut') di mana penentang kedua telah menjamin keselamatan struktur kondominium tersebut dan/atau keselamatan penghuni dan harta mereka. Suatu perintah persetujuan kemudiannya diikat antara pihak-pihak yang memperuntukkan, antara lain, kebebasan untuk memohon dalam terma umum untuk arahan dan perintah berkenaan dengan perkara berkaitan dengan perjanjian penyelesaian.

Penentang kedua kemudiannya mengambil milikan atas tanah tersebut dan memulakan kerja tanah, lalu menyebabkan retakan dan penenggelaman yang mengakibatkan perbezaan paras tingkat kondominium tersebut. Perayu-perayu telah menulis kepada peguamcara penentang pertama dan penentang pertama, dengan melaksanakan kuasa-kuasa di bawah s 70A(4) Akta Jalan, Parit dan Bangunan 1974 ('Akta tersebut'), mengeluarkan satu perintah berhenti kerja ('perintah berhenti kerja tersebut').

Selepas itu, mesyuarat lanjut telah diadakan di antara pihak-pihak dengan keputusan, menurut perayu-perayu, rundingan akan diadakan atas isu keselamatan mereka dari masa ke semasa oleh penentang pertama sebelum melaksanakan mana-mana kuasanya di bawah s 70A Akta tersebut. Ini tidak berlaku kerana berikutnya, penentang pertama membuat satu perintah yang membatalkan secara toto perintah berhenti kerja tersebut.

Perayu-perayu mencabar perintah yang dibuat oleh penentang pertama dalam membatalkan perintah berhenti kerja tersebut. Hakim menolak permohonan perayu-perayu untuk certiorari, terutamanya atas alasan bahawa perayu-perayu tidak mempunyai locus standi untuk menerima remedi certiorari. Perayu-perayu membuat rayuan. Peguam perayu-perayu berhujah bahawa kliennya mempunyai locus standi yang substantif kerana mereka adalah mangsa ketidakadilan prosedur. Peguam penentang-penentang berhujah, antara lain, bahawa: (i) doktrin keadilan prosedur atau jangkaan sah untuk menerima keadilan begitu patut ditahan jika akibat menggunakan salah satu doktrin menyebabkan keputusan yang membebankan atau tidak adil; dan (ii) terdapat perlindungan yang mencukupi dalam sfera undang-undang persendirian untuk perayu-perayu, dan dengan itu, remedi certiorari tidak patut diberikan.

Diputuskan, menolak rayuan:

(1) Adalah mantap bahawa certiorari merupakan salah satu remedi dalam undang-undang awam yang tidak boleh dituntut secara ex debito justitiae, tetapi adalah remedi berdasarkan budi bicara. Pemohon yang membuat kes boleh dinafikan remedi atas beberapa alasan, bergantung kepada fakta dan keadaan setiap kes. Salah satu daripada alasan atas mana remedi certiorari boleh ditahan

ialah di mana orang yang merayu boleh memperolehi relief yang lebih baik atau sekurang-kurangnya yang sama berkesan sama ada dalam prosiding lain atau forum alternatif. Dalam kes ini, menerusi perjanjian penyelesaian tersebut, penentang kedua telah menjamin keselamatan perayu-perayu tanpa ragu-ragu. Apabila mereka memfailkan permohonan pertama yang telah dikompromi, ia terbuka kepada perayu-perayu untuk menuntut remedi ini sehingga penyelesaian tetapi mereka tidak memilih untuk berbuat demikian. Tambahan pula, mereka mengkhaskan kepada diri sendiri, di bawah terma perintah persetujuan, hak untuk menghadap mahkamah dalam mencari penyelesaian perjanjian penyelesaian tersebut. Ini adalah perlindungan hak mereka yang mencukupi (lihat ms 604H–I dan 605D–G).

(2) Walaupun kuasa-kuasa mahkamah dalam kes remedi undang-undang awam adalah sangat luas, waspada diperlukan dalam melaksanakannya. Keadilan kes ini terletak dalam penolakan remedi berbanding dengan membenarkannya. Perayu-perayu bukanlah tanpa sebarang remedi. Remedi undang-undang persendirian mereka dalam kes ini adalah jauh lebih berkesan dan akan menghasilkan keputusan yang dikehendaki mereka.

Justeru itu, hakim yang arif adalah betul dalam menolak permohonan untuk certiorari atas alasan bahawa tiada terdapat locus standi yang substantif. Selanjutnya, pada praktikalnya kes ini tidak mewajarkan pemakaian doktrin-doktrin keadilan prosedur atau jangkaan sah. Pemakaian doktrin-doktrin ini akan menyebabkan ketidakadilan (lihat ms 606B dan 607C–D).]

Notes

For cases on certiorari, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 96–227.

Cases referred to

Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185 (refd)

Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369 (refd)

Smith & Ors v Inner London Education Authority [1978] 1 All ER 411 (refd)

Legislation referred to

Street Drainage and Building Act 1974 s 70A(4)

Appeal from: Originating Motion No R2–25–14 of 1997 (High Court, Kuala Lumpur)

Hj Sulaiman bin Abdullah (*S Selvarajah* and *Derek Fernandez* with him) (*Fernandez & Selvarajah*) for the appellants.

Tommy Thomas (*Nallini Pathmanathan* and *Asmet Nasruddin* with him) (*Skrine & Co*) for the first respondent.

Cecil Abraham (*Dhinesh Bhaskaran* and *TP Ling* with him) (*Che Mokhtar & Co*) for the second respondent. A

Gopal Sri Ram JCA: On Monday, 26 May 1997, this court was moved on an urgent basis for a stay of an order made by the first respondent, the Datuk Bandar of Kuala Lumpur, rescinding a stop work order issued by him on 18 December 1996. We heard and dismissed the application for stay but — in view of the nature of the case — came to the conclusion that an early and expedited hearing of the appeal proper would be the most appropriate step to take to have this matter resolved. Accordingly, with the consent of counsel, we directed the affidavits filed in the motion for stay to stand as the record of appeal, with liberty to file an additional volume if the need arose. The President of this court then directed this appeal to be heard today. These are the circumstances in which we come to hear this appeal. B C

The facts and background relevant to the appeal may be shortly stated. D

The appellants before us are the owners and occupiers of several apartments in a condominium called Faber Indah. It is located in Taman Desa, off Jalan Kelang Lama. There is a land below the appellants' condominium. It belongs to the first respondent. By a joint venture agreement dated 16 May 1992, the first respondent and the second respondent agreed to develop the first respondent's land. For convenience, I will call it 'the subject property'. E

The whole of the construction and other ancillary matters pertaining to the development of the subject property were left in the hands of the second respondent. Planning approval for the project was given on 8 December 1994. The appellants were dissatisfied with that decision of the first respondent. They took steps to question it. They filed Originating Motion No R3–25–6–95 seeking to quash that decision. That application came up for hearing before Azmel J but was compromised. On 17 August 1995, a settlement agreement was drawn up between the appellants and the second respondent. F G

When the application was initiated, the only respondent to it was the first respondent. Later, the second respondent intervened and was added as a party. Hence, the settlement agreement between the appellants and the second respondent.

On 29 September 1995, a consent order was entered into between the parties. That order, among other things, provides for liberty to apply in general terms for directions and orders in respect of matters pertaining to the settlement agreement. H

Following this, the second respondent took possession of the site and commenced earthworks. Piling was involved. Somewhere along the way, when piling works were in progress, the apartments of the appellants began to show signs of physical strain. Cracks began to appear and there was subsidence resulting in a difference in the floor levels. I

A The appellants were naturally apprehensive. They wrote to the solicitors of the first respondent and copied that letter to the Ministry of Housing and Local Government. This was on 2 February 1996. That letter produced an immediate effect. For on 17 February 1996, the first respondent issued what is commonly known as a stop work order. In doing this, he exercised his powers under s 70A(4) of the Street Drainage and B Building Act 1974 ('the Act'). That provision reads as follows:

> (4) The local authority may, where it certifies that the safety of life or property is affected or is likely to be affected by any earthworks, order the immediate cessation of the whole or any part of the earthworks; the certificate of the local authority under this subsection shall be conclusive C proof of the matters stated therein and shall not be questioned or be subject to any appeal or review in any court.

Later, two meetings took place between the engineers of the first respondent and the second respondent and an independent consultant employed by the latter. At the second of these meetings, at least one of the appellants D was present. The impression that the appellants gained from these meetings, as now contended, is that they would be consulted on the issue of their safety from time to time by the first respondent before he exercised any of his powers under s 70A of the Act. This did not happen.

Instead, on 16 May 1996, the first respondent issued an order E partially removing the restraints imposed by the stop work order. The appellants being dissatisfied with this decision, filed their second application on 27 June 1996.

This second application came up for hearing before Abdul Kadir Sulaiman J, who, after hearing arguments, granted a stay, the effect of which was to stop all work on the project. Later, the second respondent F intervened in the application (it not having been made a party) and successfully applied to have the stay discharged. That order was made on 12 December 1996. Six days later, that is to say on 18 December 1996, the first respondent made an order rescinding in toto the stop work order issued on 17 February 1996. Against that decision, a challenge was taken G in the instant proceedings.

This third originating motion came up for hearing before Azmel J for leave on 6 February 1997. He granted leave and a stay on 17 March 1997. The substantive motion came up before him on 27 March 1997 and it was argued over a number of days. His decision was pronounced on 5 May H 1997. He dismissed the substantive motion, we are advised, principally on the ground that the appellants had no locus standi to receive the remedy they had asked for. The present appeal is directed against this decision.

Before us, Hj Sulaiman has submitted that his clients have substantive locus standi, that is to say, the right to receive the remedy of certiorari, because they are victims of procedural unfairness. He has argued that I despite the silence in the statutory provision, namely, s 70A of the Act, his clients nevertheless have the right to receive procedural fairness because of the circumstances of this case. He has drawn to our attention the fact that

the first respondent had entered upon the scene by issuing a stop work order and by consulting his clients thereafter. A

In response to questions from the Bench, Hj Sulaiman has frankly stated that the object he seeks to achieve is not merely to quash the order of the first respondent rescinding the stop work order in toto and thereby bringing work to a halt, but to permit the work to go on with his clients being given an opportunity to be consulted. He has also said that an independent consultant such as the one earlier employed by the second respondent could be found to provide technical input for the maintenance of the safety of life and property of his clients. B

In opposing the appeal, Mr Thomas has argued that to accord procedural fairness on the present facts would constitute such a restraint upon the decision-making power of the first respondent as to delay an already delayed on-going project. He says that one ought to look at the practical realities before injecting the doctrine of procedural fairness or legitimate expectation in a given case. C

The burden of his submission, if I may summarize it, is this. The object of the doctrine of procedural fairness and that of legitimate expectation to receive such fairness to ensure that a fair and just decision is arrived at forms part of the proposition that administrative decision-makers are under a duty to act fairly. His submission is that if the consequence of injecting either doctrine is to produce a burdensome or unjust result, the doctrines should be withheld from application. D E

Mr Thomas has also argued that there is sufficient protection within the sphere of private law for the instant appellants, a point taken up and argued in greater detail by Mr Abraham of counsel for the second respondent. And it is to his submissions that I now turn. F

Mr Abraham has taken us through the relevant provisions of the Act and the by-laws made under it in order to demonstrate the strict supervision imposed on consultants employed by a developer of a project. Mr Abraham has submitted that on the facts of this case, there is sufficient alternative remedy equally efficacious to protect the appellants' rights and to remedy their grievance. The gist of his submission is that in the exercise of discretion, the remedy of certiorari ought not to be granted in this case. G

Now, it is well settled that certiorari is one of those remedies in public law which cannot be claimed ex debito justitiae, but is a discretionary remedy. An applicant who makes out a case may yet be denied the remedy on a number of grounds, depending on the facts and circumstances of each case. For example, an applicant for certiorari who is able to establish that a wrong has been done him in public law may be denied relief on the ground that the public interest outweighs his grievance (see *Smith & Ors v Inner London Education Authority* [1978] 1 All ER 411). The factors which a court may take into account when denying relief are so numerous and so variable that it is unwise and impossible to list them out. H I

One of the grounds on which the remedy of certiorari may be withheld is where the supplicant is able to obtain better or at least equally efficacious relief either in other proceedings or at an alternative forum. Sometimes, the alternative remedy is given by statute (see *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185).

A But I am unaware of any proposition that enjoins the court to decline certiorari solely on the ground that it must be statute that provides the alternative remedy. Neither has our attention been drawn to any authority which suggests the existence of such a proposition.

True, as pointed out by Hj Sulaiman of counsel for the appellants, B that in the vast majority of cases, the alternative remedy on the basis of which relief has been refused was a statutory right of appeal. But there is at least one case in which relief was denied because it could be equally obtained by way of suit (see *Jai Singh v Union of India* AIR 1977 SC 898). In that case, Khanna J delivering the judgment of the Indian Supreme Court held that the suit filed by the appellant before bringing his writ- C petition for certiorari ought to be pursued and for that reason upheld the dismissal of the application in public law. No doubt in that case the appellant had instituted an action and then moved for certiorari. But I do not think that the principle would be any different if the right to file a suit was available but no suit had yet been instituted.

D In the present case, the settlement agreement contains cl 2.1 which provides as follows:

> 2.1 FU (the second respondent) hereby guarantees that the construction and development of Danau Idaman Condominium (Phase 2B) will not affect the structural safety of Faber Indah Condominium and/or the safety of its residents and their property.

E

As can be seen, the second respondent by this clause has guaranteed the safety of the appellants in no uncertain terms. Any danger to their life, limb or property would squarely come within the purview of this clause.

When they filed the first application which was compromised, it was F open to the appellants to have pursued this remedy to conclusion. They chose not to do so. They elected, in no uncertain terms, to place the burden squarely on the shoulders of the second respondent to warrant their safety. In addition, they reserved unto themselves, under the terms of the consent order earlier referred to, the right to approach the court in the working out of the settlement agreement. The question is: is this a sufficient G protection of their rights? In my judgment, the answer must be in the affirmative.

As I observed earlier, this is an on-going project in respect of which different kinds of work are bound to occur from time to time. The appellants do not deny the second respondent the right to carry on with H the project. All that they are concerned about is damage to their property and injury to themselves. According to Mr Abraham, about 84% of the piling work has been completed. There have been advance sales of the units to be constructed to innocent third party purchasers. If the project is not completed, persons unconnected with these proceedings will suffer a very heavy loss, namely the right to have a roof above their heads.

I

From the evidence, it is clear that the second respondent had taken steps to ensure that the piling work does not cause any further harm to the appellants' apartments. They have constructed an earth berm and taken some other steps. I am convinced that the problem in this case has been principally caused by the piling work. Since that is nearly over, it would be manifestly unjust to quash the decision to rescind the stop work order.

A judge in a private law action, for example, for an injunction, would be in a much better position to deal with the complaints raised by the appellants and with the kind of supervisory remedy Hj Sulaiman has proposed. While the powers of this court in public law remedy cases are very wide, great caution must be taken in exercising them. In this context, I remind myself with of caveat neatly formulated in two works on the subject.

The first is Banerjee J's work entitled *Writ Remedies* (1995) at p 113 where the learned author says:

> This [meaning certiorari] is a discretionary remedy and is not a matter of right. It will be granted or denied according to all the circumstances of each particular case, as the ends of justice may require and in accordance with sound public policy. One of the factors that the court may have to consider and which may affect the grant of the remedy is the availability to the applicant of another remedy which is equally convenient, beneficial and effective.

The second passage appears in the treatise on *Administrative Law* by Craig (3rd Ed) at p 596:

> We have already seen that the courts exercise discretion in deciding whether to grant a remedy or not, and that they take into account a variety of factors, including: waiver, bad faith, the premature nature of the application, the absence of any injustice, the impact on third parties and the administration, and whether the decision would have been the same irrespective of the error.

Finally, the Federal Court had in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 recognized the accuracy of the statements appearing in the foregoing works. For completeness, we cite the following passage from the judgment in that case (at p 393E–394A):

> The answer to the second submission is this. The reasons given by the Industrial Court for the decision it reached are not in truth erroneous. In any event, assuming for a moment that the Industrial Court had given wrong reasons for holding that the appellant is a workman within the Act — and we hasten to repeat that this is not the case here — its ultimate decision being correct, prerogative relief whether in the form of certiorari or prohibition ought to have been withheld from the respondent. For, it must not be forgotten that these remedies are discretionary and are not available *ex debito justitiae* to an applicant who is able to demonstrate an error of law on the part of a public decision-taker.
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> The true principle governing the grant of prerogative relief appears in the following passage in the judgment of Bose J in *Sangram Singh* v *Election Tribunal* AIR 1955 SC 425 at p 429:
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> > 'That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as courts of appeal under art 226. Their powers are purely discretionary and though no limits can be placed upon that discretion, it must be exercised along recognized lines and not arbitrarily; and *one of the limitations imposed by the courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has*

A *ensued, or is likely to ensue. They will not allow themselves to be turned into courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense,* for, though no legislature can impose limitations on these constitutional powers, it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these special rights decided as speedily as may be.
B Therefore, writ petitions should not be lightly entertained in this class of case.' (Emphasis added.)

I ask myself the question: where does the justice of the present case lie? I find that the answer is that it lies in refusing the remedy rather than in granting it. The appellants are not without any remedy because of the view
C I take of the matter. Their private law remedy in this case is far more efficacious and will produce the result which they desire.

In my judgment, the learned judge was correct in dismissing the application for certiorari on the ground that substantive locus standi was wanting. I am also in agreement with the arguments of Mr Thomas that
D the practicalities of the present case do not warrant the application of the doctrines of procedural fairness or legitimate expectation. In my view, Mr Thomas' argument that the application of these doctrines will produce injustice is correct.

For these reasons, and those advanced by counsel for the respondents both here and in the court below, I would dismiss the appeal and uphold
E the orders made by the learned judge, but I will invite argument on the question of costs both here and in the court below.

Ahmad Fairuz JCA: I concur with the judgment given by my learned brother and have nothing to add.

F

Denis Ong JCA: I also concur with the judgment given by my learned brother.

Order

G The appeal is dismissed. All orders by the learned judge save as to costs are affirmed. After hearing argument on costs, the order as to costs in favour of the second respondent in the court below is set aside. There will be no order as to costs in all proceedings. All orders as to costs made against the appellants in the court below are discharged.

H *Appeal dismissed.*

Reported by Jafisah Jaafar

I